ASP Poonnam E Keling & Ors v Sri Sanjeevan a/l Ramakrishnan

COURT OF APPEAL (PUTRAJAYA) — CIVIL SUIT NO W-01(NCvC)-531–07 OF 2022
NANTHA BALAN, SEE MEE CHUN AND AZIMAH OMAR JJCA
15 SEPTEMBER 2023

Tort — False imprisonment — Unlawful detention by police — Respondent's claim against appellants for tort of false imprisonment in respect of remand of respondent under s 4(1) of Prevention of Crimes Act 1959 allowed by trial judge — Appeal against decision — Whether decision in Nivesh Nair a/l Mohan v Dato' Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors (broad grounds dated 2022) could apply retrospectively — Whether habeas corpus decision was conclusive evidence of false imprisonment — Whether trial judge erred in applying restrictive interpretation of element of 'organised violence' — Whether police officer carrying out remand in adherence to court order could be claimed to have falsely imprisoned detainee — Whether allegation of physical abuse could be ground for claim of false imprisonment — Whether unpleaded contention ought to be considered

This was an appeal against the learned High Court judge's ('learned judge') decision in allowing the respondent's ('plaintiff') claim against the appellants ('defendants') for the tort of false imprisonment in respect of the remand of the plaintiff under s 4(1) of the Prevention of Crimes Act 1959 ('the POCA'). In view of a myriad of police reports lodged by numerous complainants against the plaintiff (for alleged extortion for protection money by threat of physical, business, and reputational harm), the arresting officer ('the first defendant') had applied for a remand order for 21 days under s 4(1) of the POCA to the magistrate on 11 July 2016. Satisfied with the first defendant's due compliance of the pre-requisites under the same provision, the magistrate accordingly issued the warrant of arrest to arrest and hold the plaintiff under remand for 21 days until 31 July 2016 ('the impugned magistrate's warrant'). The plaintiff was accordingly held under remand. Four days after the remand, the plaintiff filed an application for a writ of habeas corpus at the High Court ('habeas corpus court'). On the singular issue of the impropriety of the location that the plaintiff was held under remand as stipulated in the impugned magistrate's warrant, the habeas corpus court had on 26 July 2016 allowed the plaintiff's application and ordered his immediate release. The plaintiff thereafter commenced a civil action against the first defendant (and vicariously against the second and third defendants as the Police Force and the Government of Malaysia) for false imprisonment of 16 out of the 21 days' remand under the impugned magistrate's warrant. The learned judge allowed the plaintiff's claim

for false imprisonment and hence, this appeal. A

Held, allowing the appeal:

(1) The learned judge had failed to identify that the Federal Court's decision in *Nivesh Nair a/l Mohan v Dato' Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors* (2022) (unreported) (broad grounds dated 2022) ('*Nivesh*'s case') could not retrospectively apply to the remand in the present case as the entirety of the 16 days' remand in the present case occurred six years before the Federal Court's decision in *Nivesh*'s case which declared s 4 of POCA to be unconstitutional. Although *Nivesh*'s case was decided before this appeal was heard before the court, it was only just and fair to find that *Nivesh*'s case did not retrospectively apply against the remand under s 4(1) of POCA which took place more than five years before the Federal Court's finding of unconstitutionality in *Nivesh*'s case. It would be manifestly unjust for the court to condemn the magistrate for issuing the impugned magistrate's warrant, and the first defendant to hold the plaintiff under remand when they had only done so in reliance of the provision which was still lawful and constitutional at the time. Therefore, the learned judge erred in relying on *Nivesh*'s case as a precedent to allow the plaintiff's claim for false imprisonment (see paras 7 & 13–15). B C D E

(2) The learned judge fell into error in finding that the High Court was bound by the decision of the habeas corpus court and must inevitably find that the remand was similarly unlawful. The learned judge could not automatically assume an admission or conclude a finding of false imprisonment merely relying on the fact that the habeas corpus decision was not appealed against or the fact that habeas corpus was granted to free the plaintiff from the remand. It remained solely incumbent upon the plaintiff to prove that the detention or imprisonment of the plaintiff was without any legal or just grounds. It was sorely insufficient for the plaintiff to merely rely on the technical grounds of the habeas corpus decision to ultimately prove a case for false imprisonment. The impugned magistrate's warrant might be in error, but the error did not at all diminish or negate the first defendant's legal justification to detain the plaintiff under s 4(1) of the POCA (see paras 16, 18 & 20). F G H

(3) The learned judge had primarily relied on the habeas corpus decision, without examining the legal grounds or justification upon which the first defendant had applied for the remand under s 4 of the POCA. The term 'organised violence' under the provision could not be interpreted in a strict and literal manner per se. There was clear precedent and authority that states that the element of 'organised violence' must be given a wide and non-restrictive interpretation. Based on the plethora of police reports lodged by a myriad of complainants, the first defendant believed that I

there were grounds to inquire into the plaintiff's alleged organised violence in his modus operandi to criminally extort the complainants for protection monies for fear of physical, financial, and reputational harm. The first defendant clearly had valid reasons and grounds to seek for the remand under s 4 of the POCA. Therefore, the learned judge had clearly erred in finding that the remand was unlawful (see paras 21–24).

(4) The sole ground that the habeas corpus court allowed the plaintiff's application was not at all the technical error committed by the first defendant. The error as to the location of the remand was on the impugned magistrate's warrant which was prepared and issued by the magistrate (not the first defendant). Thus, in actuality the first defendant could not be said to have falsely imprisoned the plaintiff as the first defendant was merely carrying out the arrest and remand in due compliance of the order and warrant of the court (see para 25).

(5) It was a misdirection on the part of the learned judge to consider the allegation of physical abuse as grounds for a positive finding of false imprisonment. Physical abuse during detention (although wrongful) did not form the basis for a claim for false imprisonment. Since the plaintiff had not pleaded a claim for tortious assault or battery, it was not open for the court at this late stage of appeal to determine the existence of the same. Thus, the learned judge had clearly fallen into error in considering the alleged poor 'condition of detention' (being the alleged physical abuses) to be a basis for a claim for false imprisonment (see paras 28 & 32).

(6) It would be inappropriate for the court to consider the plaintiff's unpleaded contention when the defendants were taken by surprise and were not given any opportunity to challenge the contention at trial. Only during the hearing of this appeal that the plaintiff alleged that the remand (as testified by the first defendant) was not actually under s 4 of the POCA. However, this contention would run contrary to the plaintiff's own case as the plaintiff's own pleadings clearly admitted that the plaintiff was remanded under s 4 of the POCA. The plaintiff ought to be estopped from denying that the remand was actuated under s 4 of the POCA (see paras 34–35).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan hakim Mahkamah Tinggi yang bijaksana ('hakim yang bijaksana') dalam membenarkan tuntutan responden ('plaintif') terhadap perayu ('defendan') untuk tort penahanan salah berkenaan dengan reman plaintif di bawah s 4(1) Akta Pencegahan Jenayah 1959 ('APJ'). Memandangkan pelbagai laporan polis yang dibuat oleh ramai pengadu terhadap plaintif (atas dakwaan peras ugut untuk wang perlindungan dengan ancaman bahaya fizikal, perniagaan, dan reputasi), pegawai tangkapan

('defendan pertama') telah memohon perintah reman selama 21 hari di bawah s 4(1) APJ kepada majistret pada 11 Julai 2016. Berpuas hati dengan pematuhan sewajarnya defendan pertama terhadap pra-syarat di bawah peruntukan yang sama, majistret dengan sewajarnya mengeluarkan waran tangkap untuk menangkap dan menahan plaintif di bawah reman selama 21 hari sehingga 31 Julai 2016 ('waran majistret yang dipersoalkan'). Plaintif dengan itu ditahan di bawah reman. Empat hari selepas reman, plaintif memfailkan permohonan writ habeas corpus di Mahkamah Tinggi ('mahkamah habeas corpus'). Dengan isu tunggal ketidakwajaran lokasi bahawa plaintif telah ditahan di bawah reman seperti yang ditetapkan dalam waran majistret yang dipersoalkan, mahkamah habeas corpus pada 26 Julai 2016 membenarkan permohonan plaintif dan mengarahkan dia dibebaskan serta-merta. Plaintif selepas itu memulakan tindakan sivil terhadap defendan pertama (dan secara wakil terhadap defendan kedua dan ketiga sebagai Pasukan Polis dan Kerajaan Malaysia) untuk penahanan salah selama 16 daripada 21 hari reman di bawah waran majistret yang dipersoalkan. Hakim yang bijaksana membenarkan tuntutan plaintif untuk penahanan salah dan oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Hakim yang bijaksana telah gagal untuk mengenal pasti bahawa keputusan Mahkamah Persekutuan dalam *Nivesh Nair a/l Mohan v Dato' Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors* (2022) (unreported) (alasan umum bertarikh 2022) ('kes *Nivesh*') tidak terpakai secara retrospektif terhadap reman dalam kes ini kerana keseluruhan reman 16 hari dalam kes ini berlaku enam tahun sebelum keputusan Mahkamah Persekutuan dalam kes *Nivesh* yang mengisytiharkan s 4 APJ sebagai tidak berperlembagaan. Walaupun kes *Nivesh* telah diputuskan sebelum rayuan ini dibicarakan di hadapan mahkamah, adalah adil dan saksama untuk mendapati bahawa kes *Nivesh* tidak terpakai secara retrospektif terhadap reman di bawah s 4(1) APJ yang berlaku lebih lima tahun sebelum penemuan ketidakperlembagaan Mahkamah Persekutuan dalam kes *Nivesh*. Adalah nyata tidak adil bagi mahkamah untuk mengecam majistret kerana mengeluarkan waran majistret yang dipersoalkan, dan defendan pertama menahan plaintif di bawah reman apabila mereka hanya berbuat demikian dengan bergantung kepada peruntukan yang masih sah dan berperlembagaan pada masa itu. Oleh itu, hakim yang bijaksana terkhilaf bergantung pada kes *Nivesh* sebagai duluan untuk membenarkan tuntutan plaintif untuk penahanan salah (lihat perenggan 7 & 13–15).

(2) Hakim yang bijaksana telah terkhilaf apabila mendapati Mahkamah Tinggi terikat dengan keputusan mahkamah habeas corpus dan semestinya mendapati bahawa reman itu juga menyalahi undang-undang. Hakim yang bijaksana tidak boleh secara automatik

mengandaikan penerimaan atau membuat kesimpulan dapatan penahanan salah semata-mata bergantung pada fakta bahawa keputusan habeas corpus tidak dirayu atau fakta bahawa habeas corpus telah diberikan untuk membebaskan plaintif daripada reman. Ia tetap menjadi tanggungjawab plaintif untuk membuktikan bahawa penahanan atau pemenjaraan plaintif adalah tanpa sebarang alasan yang sah atau adil. Ia amat tidak mencukupi bagi plaintif untuk hanya bergantung pada alasan teknikal keputusan habeas corpus untuk akhirnya membuktikan kes bagi penahanan salah. Waran majistret yang dipersoalkan mungkin terkhilaf, tetapi kesilapan itu tidak sama sekali mengurangkan atau menafikan justifikasi undang-undang defendan pertama untuk menahan plaintif di bawah s 4(1) APJ (lihat perenggan 16, 18 & 20).

(3) Hakim yang bijaksana pada dasarnya bergantung pada keputusan habeas corpus, tanpa meneliti alasan atau justifikasi undang-undang yang mana defendan pertama telah memohon reman di bawah s 4 APJ. Istilah 'keganasan terancang' di bawah peruntukan tidak boleh ditafsirkan dengan cara yang ketat dan literal itu sendiri. Terdapat duluan dan autoriti yang jelas yang menyatakan bahawa unsur 'keganasan terancang' mesti diberi tafsiran yang luas dan tidak terhad. Berdasarkan banyak laporan polis yang dibuat oleh sebilangan besar pengadu, defendan pertama percaya bahawa terdapat alasan untuk menyiasat dakwaan keganasan terancang plaintif dalam modus operandinya untuk memeras secara jenayah pengadu bagi mendapatkan wang perlindungan kerana ketakutan terhadap kemudaratan fizikal, kewangan, dan reputasi. Defendan pertama jelas mempunyai sebab dan alasan yang sah untuk mendapatkan reman di bawah s 4 APJ. Oleh itu, hakim yang bijaksana jelas terkhilaf apabila mendapati bahawa tahanan reman adalah menyalahi undang-undang (lihat perenggan 21–24).

(4) Alasan tunggal bahawa mahkamah habeas corpus membenarkan permohonan plaintif bukanlah kesilapan teknikal yang dilakukan oleh defendan pertama. Kesilapan lokasi reman adalah pada waran majistret yang dipersoalkan yang disediakan dan dikeluarkan oleh majistret (bukan defendan pertama). Oleh itu, sebenarnya defendan pertama tidak boleh dikatakan telah memenjarakan plaintif secara palsu kerana defendan pertama hanya menjalankan tangkapan dan reman dengan mematuhi perintah dan waran mahkamah (lihat perenggan 25).

(5) Adalah salah arah di pihak hakim yang bijaksana untuk mempertimbangkan dakwaan penderaan fizikal sebagai alasan untuk dapatan positif penahanan salah. Penderaan fizikal semasa tahanan (walaupun salah) tidak menjadi asas untuk tuntutan penahanan salah. Memandangkan plaintif tidak memplid tuntutan untuk tort serangan atau serah sentuh, ia tidak terbuka untuk mahkamah pada peringkat akhir rayuan ini untuk menentukan kewujudan yang sama. Oleh itu,

hakim yang bijaksana jelas telah terkhilaf dalam menganggap 'keadaan tahanan' yang didakwa buruk (sebagai dakwaan penderaan fizikal) sebagai asas untuk tuntutan penahanan salah (lihat perenggan 28 & 32).

(6) Adalah tidak wajar bagi mahkamah untuk mempertimbangkan pertikaian plaintif yang tidak diplid apabila defendan dikejutkan dan tidak diberi sebarang peluang untuk mencabar pertikaian di perbicaraan. Hanya semasa pendengaran rayuan ini bahawa plaintif mendakwa bahawa reman (seperti yang dinyatakan oleh defendan pertama) sebenarnya bukan di bawah s 4 APJ. Walau bagaimanapun, pertikaian ini akan bertentangan dengan kes plaintif sendiri kerana pliding plaintif sendiri dengan jelas mengakui bahawa plaintif telah direman di bawah s 4 APJ. Plaintif harus dihalang daripada menafikan bahawa reman telah digerakkan di bawah s 4 APJ (lihat perenggan 34–35).]

Cases referred to

Abdillah bin Labo Khan v PP [2002] 3 MLJ 298, CA (refd)

Aminah bt Ahmad (suing in her personal capacity and on behalf of 56 retired members of the public services) v The Government of Malaysia & Anor [2022] 4 MLJ 74, CA (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Cheah Theam Kheng v City Centre Sdn Bhd (in liquidation) and other appeals [2012] 1 MLJ 761; [2012] 2 CLJ 16, CA (refd)

Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal [2015] 1 MLJ 353, CA (refd)

Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop [2018] 5 MLJ 141, FC (refd)

Ho Yau Hong & Ors v How Yaw Ming and another appeal [2023] MLJU 933, CA (refd)

Nivesh Nair a/l Mohan v Dato' Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors (2022) (unreported), FC (refd)

PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393, FC (refd)

Shahrudi Abidin v Datuk Wira Abu Seman Yusop Timbalan Menteri Dalam Negeri Kementerian Dalam Negeri Malaysia & Ors [2021] 1 CLJ 52, CA (refd)

Spectrum Plus Ltd, Re; National Westminster Bank plc v Spectrum Plus Ltd [2005] UKHL 41, HL (refd)

Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases [2021] 3 MLJ 759, FC (refd)

Legislation referred to

Prevention of Crime Act 1959 s 4, 4(1)

Appeal from: *Sri Sanjeevan a/l Ramakrishnan v ASP Poonnam E Keling & Ors* [2022] MLJU 2748 (High Court, Kuala Lumpur)

Norfauzani bt Mohd Nordin (Senior Federal Counsel, Attorney General's Chambers) for the appellants.

Preakas Sampunathan (with Satchitanandan Vedha Ratnam) (Preakas & Partners) for the respondent.

Azimah Omar JCA:

[1] This is an appeal against the learned High Court judge's ('learned judge') decision dated 28 June 2022 to allow the respondent's claim against the appellants for the tort of false imprisonment in respect of the remand of the respondent under s 4(1) of the Prevention of Crime Act 1959 ('the POCA'). For convenience we shall refer to the parties by their titles in the High Court, ie appellants as 'the defendants' and the respondent as 'the plaintiff'.

[2] In view of a myriad of police reports lodged by numerous complainants against the plaintiff (for alleged extortion for protection money by threat of physical, business, and reputational harm), the arresting officer ('the first defendant') had applied for a remand order for 21 days under s 4(1) of the POCA to the magistrate in Kuala Lumpur on 11 July 2016.

[3] Satisfied with the first defendant's due compliance of the pre-requisites under the same provision, the magistrate accordingly issued the warrant of arrest dated 11 July 2016 to arrest and hold the plaintiff under remand for 21 days until 31 July 2016 ('impugned magistrate's warrant'). The plaintiff was accordingly held under remand pursuant to the impugned magistrate's warrant.

[4] Four days after the remand under the impugned magistrate's warrant, the plaintiff filed an application for a writ of habeas corpus on 15 July 2016 at the Kuala Lumpur High Court ('habeas corpus court'). On the singular issue of the impropriety of the location that the plaintiff was held under remand as stipulated in the impugned magistrate's warrant, the habeas corpus court had on 26 July 2016 allowed the plaintiff's application and ordered his immediate release.

[5] Premised on the decision of the habeas corpus court in allowing the plaintiff's application, the plaintiff thereafter commenced a civil action against the first defendant (and vicariously against the second and third defendants as

the Police Force and the Government of Malaysia) for false imprisonment of 16 out of the 21 days' remand under the impugned magistrate's warrant. The learned judge allowed the plaintiff's claim for false imprisonment on the following primary reasons:

(a) the High Court was bound to follow the habeas corpus court's decision and finding that the impugned magistrate's warrant was not in compliance with the law and thus, the entirety of the 16 days' remand was unlawful;

(b) the High Court was bound to follow the recent 2022 Federal Court decision in *Nivesh Nair a/l Mohan v Dato' Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors* (2022) (unreported) ('*Nivesh*'s case') that s 4 of POCA was unconstitutional and thus, the remand in 2016 was automatically unconstitutional;

(c) since the appeal against the habeas corpus court's decision was withdrawn, then it ought to mean that the defendants have admitted that the entirety of the remand was unlawful; and

(d) the burden of proof is on the defendants to prove that the plaintiff was not physically abused during the time of the 16 days' remand.

[6] Upon our analysis and reading of the learned judge's grounds of judgment, we have identified the following errors which would warrant appellate intervention on our part.

RETROSPECTIVELY APPLYING *NIVESH NAIR*'S CASE

[7] *First*, the learned judge had failed to identify that the *Federal Court's* decision in *Nivesh*'s case decided in 2022 *cannot retrospectively apply* to the remand in the present case as the entirety of the 16 days' remand in the present case occurred six years before the Federal Court's decision in *Nivesh*'s case which declared s 4 of the POCA to be unconstitutional. In fact, in the High Court the discourse on the appropriate treatment of *Nivesh*'s case (whether retrospective or prospective) was not taken up in the submissions by the appellants or even the respondent. Thus, it would naturally follow that the learned judge's decision would be entirely lacking in the same aspect as well.

[8] We are aware that unlike legislative amendments to the law (which ought only to apply prospectively unless stated otherwise), judicial decisions or judicial pronouncements only have a 'retrospective effect' in becoming a judicial precedent that is applicable to cases which have yet to reach finality (even to those cases which were pending appeal with facts and events occurring even before the judicial pronouncement) (see Federal Court in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393):

A That brings us to the instant appeal. Here, the direction by the High Court in its judgment is not in accordance with *Muhammed bin Hassan*. That is through no fault of the learned judge. His decision in the present case was handed down long before *Muhammed bin Hassan* was decided. *But a decision of this court — or indeed of any court — is retrospective in effect unless a specific direction of prospectivity is* B *expressed*. (Emphasis added.)

[9] Nonetheless, this general rule of retrospectivity is certainly not absolute or without exceptions. Especially when the judicial decision or pronouncement has a 'legislative effect' as to the validity or constitutionality of C a provision, it would be manifestly unjust to retrospectively condemn conducts which were carried out in reliance of the same provision which at the material time was still constitutional and valid law.

D **[10]** In *Radzi bin Abu Bakar*, the Federal Court also discussed the doctrine of 'Prospective Overruling' as a valuable tool to mitigate the unfair or adverse consequences of retrospective application of a judicial decision (as precedent) invalidating statutory law which would unfairly chastise persons who (prior to the judicial decision) validly acted in reliance of the law at the time when the law was still constitutional or valid. The Federal Court adopted the Court of E Appeal's decision in *Abdillah bin Labo Khan v Public Prosecutor* [2002] 3 MLJ 298 which reads as follows:

> *In the United States, in respect of constitutional matters, that is to say, where a statute is declared unconstitutional, the power to declare such a ruling to be prospective* only was F asserted in 1965 in the case of *Linkletter v Walker* (1965) 381 US 618 at p 628. *That principle has been adopted into our jurisprudence in Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311, where at pp 320–321, Abdoolcader SCJ said:
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> > *The general principle of retroactivity of a judicial declaration of invalidity of a law was overturned* by the Supreme Court of the *United States of America in Linkletter* G *v Walker* (1965) 381 US 618 (at p 628) *when it devised the doctrine of prospective overruling in the constitutional sphere in 1965 as a practical solution for alleviating the inconveniences which would result from its decision declaring a law to be unconstitutional, after overruling its previous decision upholding its constitutionality.* This doctrine was applied by the Supreme Court of India in *LC Golak Nath v State of Punjab & Anor* AIR 1967 SC 1643 (at pp 1666–1669). The H doctrine — *to the effect that when a statute is held to be unconstitutional, after overruling a long standing current of decisions to the contrary, the court will not give retrospective effect to the declaration of unconstitutionally so as to set aside proceedings of convictions or acquittals which had taken place under that statute prior to the date of the judgment which declared it to be unconstitutional*, and convictions or I acquittals secured as a result of the application of the impugned statute previously will accordingly not be disturbed. (Emphasis added.)

[11] Within the Commonwealth sphere, the House of Lords in the case of *Re Spectrum Plus Ltd; National Westminster Bank plc v Spectrum Plus Ltd* [2005]

UKHL 41 expounded on the same doctrine of prospective overruling in the following words:

> People generally conduct their affairs on the basis of what they understand the law to be. *This 'retrospective' effect of a change in the law of this nature can have disruptive and seemingly unfair consequences. 'Prospective overruling', sometimes described as 'non-retroactive overruling', is a judicial tool fashioned to mitigate these adverse consequences.* It is a shorthand description for court rulings on points of law which, to greater or lesser extent. (Emphasis added.)

[12] Most recently and closer to home, the Court of Appeal in the case of *Aminah bt Ahmad (suing in her personal capacity and on behalf of 56 retired members of the public services) v The Government of Malaysia & Anor* [2022] 4 MLJ 74 had reaffirmed the position that a judicial decision deeming a legislation to be unconstitutional falls well within the doctrine of prospective overruling (and ought not to be applied retrospectively):

> 'It is a fundamental principle of adjudicative jurisprudence that all judgments of a court are retrospective in effect'. *However, the law has evolved to afford courts, in appropriate cases, with a discretion to mitigate foreseeable adverse consequences and hardship, especially if it would otherwise affect a class of the citizenry.* This may sometimes be achieved by invoking the doctrine of 'prospective overruling'; a ruling that is to be effective only prospectively.
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> ...
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> *'Prospective overruling'* is clearly an exception to the general rule ... *In cases involving the avoidance of a law,* which has stood for some time, *for being in contravention of the Federal Constitution, the doctrine of prospective overruling would be available to give effect to the raison d'etre for its existence*. (Emphasis added.)

[13] There is unbridled wisdom in all of the aforementioned precedents which is equally and justly applicable to the present case. Although *Nivesh*'s case was decided before this appeal was heard before us, it is only just and fair that we find that *Nivesh*'s case does not retrospectively apply against the remand under s 4(1) of the POCA which took place more than five years before the Federal Court's finding of unconstitutionality in *Nivesh*'s case.

[14] A retrospective application of *Nivesh*'s case would be utterly chaotic and problematic as it would then open the floodgates for any and all remands under the said provision to become unconstitutional or unlawful despite the fact that the remands were lawfully and constitutionally carried out during the time when the provision was still lawful and constitutional. It would be manifestly unjust for us now to condemn the magistrate for issuing the impugned magistrate's warrant, and the first defendant to hold the plaintiff under remand when they have only done so in reliance of the provision which was still lawful and constitutional at the time.

[15] All of the above considered, we find that the learned judge erred in relying on *Nivesh*'s case as a precedent to allow the plaintiff's claim for false imprisonment.

WHETHER THE HABEAS CORPUS DECISION WAS CONCLUSIVE EVIDENCE OF FALSE IMPRISONMENT

[16] *Secondly*, the learned judge fell into error in finding that the High Court was bound by the decision of the habeas corpus court and must inevitably find that the remand was similarly unlawful. We have identified that this error was brought about by the plaintiff's out-of-context reading of the principle expounded in the Court of Appeal case of *Shahrudi Abidin v Datuk Wira Abu Seman Yusop Timbalan Menteri Dalam Negeri Kementerian Dalam Negeri Malaysia & Ors* [2021] 1 CLJ 52. The plaintiff selectively and in isolation staunchly relied on the following excerpt of the decision:

> *The respondents, by not appealing against the order made in the habeas corpus proceedings, must be taken to have accepted the findings of the court as correct and valid.* In the circumstances, it was not open to the respondents to suggest that the habeas corpus proceedings were irrelevant and could not be accepted as evidence. (Emphasis added.)

[17] However, this excerpt was not at all reflective of the entirety of the Court of Appeal's decision in *Shahrudi*'s case. We take this view because in *Shahrudi*'s case the Court of Appeal did not state that the failure to appeal against a habeas corpus decision can automatically be deemed as an admission to the correctness of the civil claim for false imprisonment. What was instead actually found and decided by the Court of Appeal was the extreme opposite. The Court of Appeal in plain and obvious terms instead found that a successful habeas corpus decision (even one which was not appealed against) is not conclusive evidence and does not form the basis of a civil action for false imprisonment. The actual full breadth of the Court of Appeal's ratio decidendi reads as follows:

> *False imprisonment involves* the wilful restraint off another against their will *without legal justification* ...
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> ...
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> *However, the habeas corpus WAS NOT CONCLUSIVE, but only evidence* which must be considered by the Court ... *It was NOT RES JUDICATA as the HABEAS CORPUS PROCEEDINGS PROVIDED A DIFFERENT REMEDY compared to the instant proceedings ... IT WILL NOT FOLLOW THAT SUCCESS ON HABEAS CORPUS WOULD FORM THE BASIS OF THE CIVIL ACTION.*

[18] The excerpt above would plainly and obviously be detrimental to the plaintiff's case and would reveal the glaring error in the learned judge's appreciation of the law and facts. It is resoundingly clear the learned judge cannot automatically assume an admission or conclude a finding of false

imprisonment merely relying on the fact that the habeas corpus decision was not appealed against or the fact that habeas corpus was granted to free the plaintiff from the remand.

[19] As astutely explained by the Court of Appeal in *Shahrudi*, the nature of false imprisonment as remedy is starkly different from the nature of habeas corpus. A habeas corpus as remedy can be applied for and be allowed by the court to free a detainee if there were matters both technical and substantive which would entitle the detainee to be immediately released. On the other hand, the tort of false imprisonment transcends beyond mere technicalities and encroaches the issue on the justifiability of the detention itself.

[20] Thus, even if we are bound to accept the habeas corpus decision, the same decision is hardly conclusive evidence to establish a case for false imprisonment. It still remains solely incumbent upon the plaintiff to prove that the detention or imprisonment of the plaintiff was without any legal or just grounds. It is sorely insufficient for the plaintiff to merely rely on the technical grounds of the habeas corpus decision to ultimately prove a case for false imprisonment. The impugned magistrate's warrant might be in error, but the error does not at all diminish or negate the first defendant's legal justification to detain the plaintiff under s 4(1) of the POCA.

THE LEARNED JUDGE HAD ERRED IN APPLYING A RESTRICTIVE INTERPRETATION OF THE ELEMENT OF 'ORGANIZED VIOLENCE'

[21] *Thirdly*, the learned judge had primarily relied on the habeas corpus decision, without examining the legal grounds or justification upon which the first defendant had applied for the remand under s 4 of the POCA. In the absence of such deliberation, we are compelled to determine the said issue.

[22] In this regard, we are in full agreement with the appellant's submission that the term 'organized violence' under the provision cannot be interpreted in a strict and literal manner per se. The respondent insisted that the threshold of evidence was that the first appellant must prove that there were grounds to believe that the plaintiff had caused fear and organized violence against persons or property. In brief, the plaintiff insisted that organized violence must strictly mean violence or physical harm against persons' bodies or properties. We are disinclined to agree with such restrictive interpretation.

[23] Violence against persons or property can be perpetrated in a plethora of criminal acts and conduct. There is no authority or precedent to suggest that violence can only refer to physical violence against persons or property. On the contrary, *there is clear precedent and authority that states that the element of*

'organized violence' must be given a wide and non-restrictive interpretation. We need only to refer to the Federal Court decision in the case of *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759 where it was stated that:

> The meaning of 'organised violence against persons or property' must be assessed through the context and the entire scheme of the POCA. *The words 'organised violence against persons or property' must not be interpreted restrictively as suggested*. Unlawful gaming activity has evolved into a much more sophisticated illicit activity that even in this present day constitutes a threat to public order and safety.
>
> The intent of the POCA as expressed in the long title of the Act is for effectual prevention of crime throughout Malaysia and for the control of criminals, members of secret societies, terrorists and other undesirable persons, and for matters incidental thereto.
>
> So, to return to the central issue — whether the crime of unlawful gaming falls within the category of 'organised violence against persons or property'. The word 'organised' means 'arranged or planned well in the way mentioned'. As an adjective, it is 'involving large numbers of people who work together to do something in a way that has been carefully planned' (*Oxford Learner Dictionaries*).
>
> The word 'violence' literally means 'behaviour involving physical force that is intended to hurt, damage, or kill somebody or something'; physical or emotional force and energy; to damage something or have a bad effect on it (*Oxford Learner's Dictionaries*). *'Violence' has also been defined as consistent of a pattern of coercive behaviours used by a competent adult to establish and maintain power and control over about competent adult taking the form of physical and psychological damage to the person* (N Ozbaci and Z Erkan: *Metaphors for Violence*, Coll. Antropol. 39(2015) 1: 193–201). *In this light, it can be appreciated that there are two aspects to violence — physical and non-physical.*
>
> In the context of the POCA 1959, the phrase 'organised violence against persons or property' *must be juxtaposed with the meaning of the word 'unlawful gaming'*. (Emphasis added.)

[24] Based on the plethora of police reports lodged by a myriad of complainants, the first defendant believed that there were grounds to inquire into the plaintiff's alleged organized violence in his modus operandi to criminally extort the complainants for protection monies for fear of physical, financial, and reputational harm. The complainants were a class of citizens who are allegedly living in fear of the alleged criminal extortion pressed upon by the plaintiff. Thus, the first defendant clearly had valid reasons and grounds to seek for the remand under s 4 of the POCA. Therefore, the learned judge had clearly erred in finding that the remand was unlawful.

THE LEARNED JUDGE HAD ERRED IN FAILING TO APPRECIATE THAT A POLICE OFFICER CARRYING OUT A REMAND IN ADHERENCE TO A COURT ORDER CANNOT BE CLAIMED TO HAVE FALSELY IMPRISONED THE DETAINEE

[25] *Fourth*, it must be emphasized that the sole ground that the habeas corpus court allowed the plaintiff's application was not at all the technical error committed by the first defendant. The error as to the location of the remand was on the impugned magistrate's warrant which was prepared and issued by the magistrate (not the first defendant). Thus, in actuality the first defendant cannot be said to have falsely imprisoned the plaintiff *as the first defendant was merely carrying out the arrest and remand in due compliance of the order and warrant of the court.*

[26] The Federal Court in the case of *Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop* [2018] 5 MLJ 141 had clearly set the principle that even if it can be proven that a police officer had maliciously or wrongfully applied and caused the court to issue a remand order (which later caused the remand of the detainee) that police officer cannot be said to have falsely imprisoned the detainee as the police was only carrying out the order of the court. Instead of false imprisonment, the proper cause of action (for unjustifiably causing the issuance of the remand order) should have been that of malicious prosecution:

> *A person who brings about an arrest* by merely setting in motion the formal process of law, as by making a complaint before a justice of the peace or applying a warrant *is not liable for false imprisonment because courts of justice are not agents of the prosecutor and their acts are not imputable to him.* He is liable, if at all, only for the misuse of legal process by procuring an arrest for an improper purpose for which the appropriate remedy is an action for malicious prosecution. This rule provides a valuable protection against liability for error in the course of legal proceedings (*The Law of Torts* by Fleming at p 38).
>
> Civil Actions Against the Police at p 116 observed *that 'where an imprisonment is effected through judicial proceedings, liability for false imprisonment virtually disappears',* on account of the following dicta of Willes J in *Austin v Dowling* (1870) LR 5 CP 534.
>
> ...
>
> In short, a judicial order provides the defence of lawful authority for the detention or imprisonment (see Hepple and Matthews' *Tort Law: Cases and Materials* by David Howarth, Martin Matthews, Jonathan Morgan, Janet O'Sullivan, Stelios Tofaris (2016 Publication) at p 750).
>
> In the instant case, the respondent was remanded under the judicial order of a magistrate. The remand order might have been wrongly applied. It might even have been that there was no reasonable cause or basis for a remand order. The remand order might have been applied and or issued without compliance with s 117 of the Criminal Procedure Code. *The remand order might even have been set aside. But that,*

with respect, was all INCONSEQUENTIAL in a claim for false imprisonment ... (Emphasis added.)

[27] In this appeal before us, the plaintiff's claim fails on both fronts of: (i) claiming and pleading for the wrong remedy for false imprisonment instead of malicious prosecution; and (ii) ultimately failing to prove that the first defendant had applied for the remand under s 4 of the POCA without just cause. Thus, even if the plaintiff have pleaded a case for malicious prosecution (which he had not), the plaintiff's claim would still fail.

THE LEARNED JUDGE HAD ERRED IN FINDING THAT THE 'CONDITION OF DETENTION' (PHYSICAL ABUSE ALLEGATIONS) CAN BE A GROUND FOR A CLAIM FOR FALSE IMPRISONMENT

[28] *Fifth*, it was a misdirection on the part of the learned judge to consider the allegation of physical abuse as grounds for a positive finding of false imprisonment. Physical abuse during detention (although wrongful) does not form the basis for a claim for false imprisonment. A claim for false imprisonment is a cause of action in instances where the detention or imprisonment arose without just cause.

[29] Now, we are certainly not condoning acts which constitute abuse of power and unlawfully causing hurt against detainees by the police during imprisonment or remand. Again, if there were instances of physical abuse on a detainee, the physical abuse is a separate matter altogether to the judicial and legal ground which forms the basis of the remand under s 4 of the POCA.

[30] The element of abuse during detention and valid grounds for remand is not at all mutually exclusive. Both elements can co-exist at the same time. The arresting officer might have justifiable grounds to apply for remand and the magistrate might also have justifiable grounds to order remand while at the same course of arrest there was physical abuse caused against the detainee. Even in such instance, the physical abuse does not negate the justifiability of the arresting officer's application and the magistrate's issuance of the remand order or warrant.

[31] These trite principles were clearly stated in the Court of Appeal's decision in the case of *Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal* [2015] 1 MLJ 353 where the Court of Appeal had dismissed a case for false imprisonment even when the detainee was beaten to death during imprisonment. The Federal Court in plain terms held that the proper cause of action for abhorrent 'condition of detention' can only give rise to a claim for trespass against persons (in assault, battery, and

negligence) but never for false imprisonment.

> [22] *It is our respective view the abuses which the deceased endured DO NOT AND CANNOT give rise to a cause of action for false imprisonment.* The cause of action for a tort of false imprisonment arises when a person has been imprisoned without lawful justification and that action is against the person who caused the imprisonment. Here the person who caused the detention is a magistrate exercising his judicial power and that judicial act had not been set aside or declared unlawful.
>
> [23] In *R v Deputy Governor of Parkhurst Prison, ex p Hague; Weldon v Home Office* [1992] 1 AC 58 where a similar false imprisonment claim was made premised on the allegation that conditions of detention had become intolerable, the House of Lords held, inter alia, as follows:
>
> > That although, where the conditions of detention of a prisoner were such as to be intolerable an otherwise lawful detention was not rendered unlawful, such conditions might give rise to public law remedy and, where prisoner suffered injury to health, a remedy in private law as well; such a remedy would lie in negligence rather than in false imprisonment.
>
> Their Lordships also held that there must be a clear distinction between the 'nature of detention' and that of 'conditions of detention'. The nature of detention is a result of a judicial act and remains valid until set aside. *The conditions of detention do not relate to 'nature of detention' and if such conditions become intolerable or illegal, they give rise not to the tort of unlawful detention*.
>
> ...
>
> [25] *Accordingly we find that the tort of false imprisonment is not available to the plaintiff as there was in place a valid remand. What is available to the plaintiff to claim is the tort of trespass which encompasses assault and battery and negligence.* The plaintiff in fact had claimed for pain and suffering from the assault and battery during the detention and arising from the same was awarded damages which we have said earlier are not appealed against by the defendants. (Emphasis added.)

[32] Thus, since the plaintiff had not pleaded a claim for tortious assault or battery, it is not open for us at this late stage of appeal to determine the existence of the same. Thus, it stands that the learned judge had clearly fallen into error in considering the alleged poor 'condition of detention' (being the alleged physical abuses) to be a basis for a claim for false imprisonment.

FINDING NOT BASED ON THE PLEADINGS

[33] *Lastly*, for the sake of completeness we are minded to disregard the plaintiff's unpleaded contention that the remand was unlawful on the allegation that the plaintiff was not properly informed of the grounds of his arrest and remand. This contention was neither raised before the habeas corpus court nor was it ever raised or even pleaded before the learned judge. We have also sighted all of the relevant documentations leading up to the issuance of the impugned magistrate's warrant that all bore the plaintiff's signature and

admission that he was well aware and informed that the arrest and remand was actuated under s 4 of the POCA.

[34] In any case, this issue was not even raised in the plaintiff's written submission and was only raised during the hearing of the appeal. It would be inappropriate for us to consider this contention when the appellants were taken by surprise and were not given any opportunity to challenge this contention at trial.

[35] We are also aware that only during the hearing of this appeal that the plaintiff alleged that the remand (as testified by the first defendant) was not actually under s 4 of the POCA. However, this contention would run contrary to the plaintiff's own case as the plaintiff's own pleadings clearly admitted that the plaintiff was remanded under s 4 of the POCA. In fact, it is the plaintiff's own case that the remand was false imprisonment by the threshold of 'organized violence' under the exact same provision. In fact, the chief complaint of the plaintiff was that the plaintiff was remanded not at the centre which was *gazetted* under the POCA. Thus, apart from this contention being entirely unpleaded, we find that the plaintiff ought to be estopped from denying that the remand was actuated under s 4 of the POCA. The plaintiff cannot blow hot and cold in its reliance to s 4 of the POCA (see *Ho Yau Hong & Ors v How Yaw Ming and another appeal* [2023] MLJU 933; *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; and *Cheah Theam Kheng v City Centre Sdn Bhd (in liquidation) and other appeals* [2012] 1 MLJ 761; [2012] 2 CLJ 16).

CONCLUSION

[36] All of the above considered, we hereby *ALLOW the APPEAL*. The learned judge's decision and order at the High Court below is hereby set aside and reversed *in toto*. We also order costs of RM60,000 as costs here and below to be paid by the respondent to the appellants.

Appeal allowed.

Reported by Ahmad Ismail